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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 127

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

Petitioner,

versus

MRS. MARIA CONSUELO GARCIA DODART DEBRAM, individually and for and on behalf of her minor daughter, Maria Andrea Dodart,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

W. FORD REESE,
HENRY B. ALSOBROOK, JR.,
847 National Bank of
Commerce Building,
New Orleans, Louisiana,
Counsel for Petitioner.

Of Counsel:
ADAMS AND REESE.

HAUSER PRINTING CO., INC., NEW ORLEANS

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MRS. MARIA CONSUELO GARCIA DODART DEBRAM, individually and for and on behalf of her minor daughter, Maria Andrea Dodart,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled case on January 12, 1962, wherein a re-hearing was denied on February 22, 1962.

I.

CITATIONS TO OPINIONS BELOW

The District Court Judgment entered on a verdict rendered after trial by jury is printed in full in the

Record at p. 390. The opinion of the Circuit Court of Appeals is printed in Appendix A hereto, *infra* p. 15, is reported in 297 F. 2d 858. Rehearing in the Circuit Court of Appeals was denied without a written opinion, Appendix B, *infra* p. 18.

II.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 12, 1962. Re-hearing was denied on February 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

III.

QUESTIONS PRESENTED FOR REVIEW

(A) Whether the District Court erred in failing to grant defendant-appellants motion for (a) a directed verdict at the conclusion of the plaintiff's case, (b) a directed verdict at the conclusion of the entire case, and (c) a judgment notwithstanding the verdict of the jury.

(B) Whether, under the appropriate and applicable Louisiana law, the plaintiffs in the Court below carried the burden of proving actionable negligence on the part of petitioner's assured.

IV.

STATEMENT OF THE CASE

The plaintiffs, Mrs. Maria Consuelo Garcia Dodart Debram, individually and for and on behalf of her minor daughter, Maria Andrea Dodart and Richard V. De Bram filed suit against Massachusetts Bonding and Insurance Company, appellant herein, for personal injuries and property damage as a result of an automobile accident in which they were involved and which occurred in the

city limits of Boutte, Louisiana on January 21, 1959. Massachusetts Bonding and Insurance Company was the named defendant as the liability insurance carrier of the Terrebonne Lumber Company, employer of Calvin Williams, driver of the adverse vehicle and which vehicle was owned by the Terrebonne Lumber Company. Trial was held in the United States District Court for the Eastern District of Louisiana, New Orleans Division, Honorable J. Skelly Wright, presiding, before a jury on October 25 and 26, 1960, resulting in a Judgment in favor of Mrs. Maria Consuelo Garcia Dodart DeBram, individually, in the sum of FIVE THOUSAND AND NO/100 ($5,000.00) DOLLARS, and in favor of Mrs. DeBram, for the use and benefit of her minor child, in the sum of FIFTY THOUSAND AND NO/100 ($50,000.00) DOLLARS, plus medical expenses stipulated and against Massachusetts Bonding and Insurance Company. The jury rejected the demand of Mr. DeBram. Jurisdiction in the United States District Court was under 28 U.S.C. 1332 (a) (1). From the adverse Judgment rendered against it and in favor of Mrs. DeBram and her minor daughter, Massachuetts Bonding and Insurance Company prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit. The verdict of the jury was affirmed by the Court of Appeals and that same court denied, without written opinion, a petition for rehearing, Appendix A and Appendix B.

V.

REASONS FOR GRANTING THE WRIT

The questions presented for review herein are so closely related that they shall be presented in one argument for the consideration of this Honorable Court.

It is the firmly established jurisprudence no longer

to be questioned, that in personal injury actions arising from automobile accidents, the law of the place where the accident occurs in determinative of the question of negligence. The instant accident occurred in Louisiana and it is therefore to the law of Louisiana that we must turn to determine if under the facts of this case, actionable negligence has been proved as against the driver of your applicant's assured driver.

The instant action was filed pursuant to Article 2315 of the Louisiana Civil Code L.R.S. 9, Sec. 2315, which reads in part as follows:

> "Every act whatever of may that causes damage to another, obliges him by whose fault it happened to repair it; * * * ."

The word "fault" as contained in the quoted codal provision is synonymous with "negligence".

The decisions emanating from the Courts of Louisiana in automobile accident cases define the duty of a motorist traveling in obedience to positive law and we quote the pertinent language of the Supreme Court of the State of Louisiana in the case of *Kientz vs. Charles Dennery*, 24 So. 2d 292, where it was held:

> "Hence, in gauging the fault which is attributed to one, who was operating his car in obedience to positive law, the courts should be convinced that the dereliction was most substantial and that it was such a direct factor that, without it, the accident would not have occurred."

To this same effect see *Bryant vs. Ouachita Coca Cola Bottling Company*, 117 So. 2d 919.

In the recent case of *Greyhound Corporation vs. Howard Sparks*, 283 F. 2d 44, (Fifth Circuit) (Adv.

Sheets 12-12-60), the Court measured the legal obligation of a motorist who was proceeding in accordance with positive law and held that the driver of a motor bus approaching a blind intersection on a through-highway was under no legal duty to anticipate that an automobile would violate the law, and without stopping enter the main traveled or through-highway on which the bus was travelling; that no such danger could be reasonably foreseen, and as a matter of law, common prudence did not require the bus driver to sound a horn.

Additionally, there is well settled jurisprudence in Louisiana to the effect that a motorist travelling on the right or proper side of the road, has the right to assume that the **driver of a vehicle approaching from the opposite direction, on the right side of the road, will return to the proper side in sufficient time to meet and pass** in safety.

The Supreme Court of the State of Louisiana has also clearly defined the obligation of a motorist meeting an oncoming vehicle. In *Aquillard vs. State*, La. App. 1942, 7 So. 2d 645, 648, and 649, and cited as controlling in the recent case of *Cook vs. Dance*, 96 So. 2d 350, 353, it was there held:

> "The reasonable and natural things for him to do, and **what the law and the rules of the road contemplate, is that he should keep to his right path in the road and rely on the assumption which he has a right to make that the other driver will get back to his side of the road before running into him.**" (Emphasis supplied and cited cases omitted)

In *Cook vs. Dance, supra*, the Supreme Court, after citing as controlling the above principle of law, went on to state:

> " • • • In such circumstances he may not be said

to be guilty of negligence if he makes such a choice as a person of ordinary prudence would have made even though it appear later that he did not make the wisest choice. He is not held to the same coolness, accuracy of judgment or degree of care that is required of him under ordinary circumstances * * *."

"Therefore, it is immaterial in such a situation, that defendant, as contended by plaintiff, could have stopped or driven completely off the highway and thereby have avoided the accident. Such maneuver, even when subsequently reviewed, would not have brought assurance that the truck would not have continued its course and run into the car. Where it appears perfectly clear defendant was confronted with a sudden emergency without fault on his part, negligence cannot be attached to any error of judgment attending his reaction to the circumstances." (Cited cases omitted)

To this same effect, *Stockwell-Gulf Engineering Co.*, 83 So. 2d 386.

The uncontradicted facts of this case show that applicant's assured (Calvin Williams) was travelling at a legal rate of speed (R. 118, 122) and on the proper side of a four-lane highway, two lanes on each side separated by a neutral ground area (R. 122, 123, 129).

Mr. DeBram, the only eye witness to the accident besides Calvin Williams, testified in effect that he was driving toward New Orleans from the direction of Raceland and that prior to the time that he reached the corporate limits of Boutte, Louisiana, he was travelling on a two lane highway, one lane of traffic going in each direction. Mr. DeBram testified that he was following the white center line separating these two roadways and that in doing so he did not observe that the highway

opened into a four lane highway separated by a neutral ground in the town of Boutte, Louisiana, and this caused him to drive his automobile onto the neutral ground area so that his vehicle straddled the neutral ground still facing in the direction toward New Orleans at which point he stopped his vehicle. (R. 222). Mr. DeBram then testified that realizing that he was off the roadway, he looked in his rear view mirror to determine if traffic was coming from his rear, (R. 225) and observed none. He then looked ahead of him and observed the Williams vehicle coming toward him. (R. 223). Mr. DeBram then testified that he blinked his light toward the Williams car and then turned his wheel to the left and attempted to drive his automobile across the two lanes of traffic, one of which was occupied by the Williams' car that he had observed approaching him. (R. 197, 198). Mr. DeBram, in answer to a question by the Court and following several questions by counsel on cross-examination as to how long after he started to move his vehicle from the stopped position on the neutral ground that the accident occurred stated **"It is impossible for me to tell you whether it was one second or two seconds or what. I am sorry to talk like that, but it is impossible for me to tell you."** (R. 229).

On cross-examination, Mr. DeBram was specifically asked about the events leading up to the accident that he recalled prior to January 1960, at which time a State Court proceeding was filed on his behalf concerning the identical accident. The Court's attention is specifically directed to the Record at Pages 212 and 213, wherein **Mr. DeBram admitted that before January, the remembered having stopped on a neutral ground and remembered seeing the Williams vehicle approaching from the opposite direction and remembered attempting to cross the highway in front of the oncoming Williams vehicle.** Further Mr. DeBram recalled that prior to January,

1960, he had discussed this case with his attorney and had given them whatever information he knew concerning the accident. (R. 232). It was brought out on cross-examination of Mr. DeBram that in January, 1960, and in the State Court proceeding, the allegation was made: "That petitioner in the rain and darkness and on an improperly marked highway started to drive his automobile into the right lane at the point where the highway divides into four lanes of traffic; but upon seeing his mistake, applied his brakes and tried to avoid the accident, but, nevertheless, was struck by an oncoming car being driven in the opposite direction by one, Calvin Williams * * *." (R. 231).

Calvin Williams, appellant's assured's driver, testified that he was driving from New Orleans in the direction toward Raceland and that as he entered the corporate limits of Boutte, Louisiana he slowed his vehicle to approximately 30 or 40 miles per hour. (R. 118, 122). Williams testified that he observed the approaching DeBram vehicle and assumed that this vehicle was travelling in its proper lane of traffic. (R. 133). Williams further testified that he, Williams, was driving his vehicle in the right hand lane of traffic and not in the lane of traffic next to the neutral ground (R. 122, 123, 129) and that the first time he knew that the DeBram vehicle was in the wrong lane of traffic was immediately before the impact (R. 135, 136) and that he, Williams, didn't have time to do anything to avoid the accident (R. 139) because it happened so fast, and without any warning. (R. 136, 137, 138, 139). **Williams testified that not more than one or two seconds passed from the time he knew an accident was imminent until the moment of impact** (R. 142) and then the DeBram car came skidding across the highway broadside and into the path of his vehicle. (R. 135, 136, 137, 138, 139, 141).

From the above facts testified to at the trial, it is perfectly clear that under either the testimony of Mr. DeBram at the trial, or under the allegations made in his State Court pleadings, this unfortunate accident occurred within one or two seconds after the DeBram vehicle entered the roadway legally occupied by the Williams vehicle. Williams' testimony coincides perfectly with the allegations contained in the State Court action filed by the respondents and, most importantly, Williams also positively stated that this accident occurred in one or two seconds after the DeBram vehicle entered the roadway occupied by his vehicle, and before he had an opportunity to do anything to avoid it.

Under the authority of *Cook vs. Dance, supra, Aquillard vs. State, supra* and *Stockwell vs. Gulf Engineering Co., supra,* Calvin Williams had the absolute right to rely on the assumption that the DeBram vehicle would stay on its side of the highway, and it is immaterial in such a situation that Williams did not stop or drive completely off the highway.

In addition, and most importantly, under the uncontradicted testimony of Mr. DeBram and Mr. Williams, this accident occurred within a period of one or two seconds. The Williams vehicle was travelling at between 30 and 40 miles per hour (R. 118, 122). Under the authorities above cited, and particularly the cases of *Kientz vs. Charles Dennery, supra,* and *Bryant v. Ouachita Coca Cola Bottling Company, supra,* which set forth the burden of proof necessary to show negligence on the part of a motorist operating a vehicle in obedience to positive law, and which cases hold that such negligence must be **most substantial,** the plaintiffs below have utterly failed to carry the burden of proof necessary.

At this point, appellant respectfully calls the Court's attention to the very recent case emanating from the United States Court of Appeals for the Second Circuit, to-wit, the case of *Harshberger v. Associated Transport, Inc.*, 282 F. 2d 179, decided August 29, 1960, and the facts of which case are clearly analogous to the facts of the instant case:

> "On April 7, 1956, at about 4:30 A.M., **two vehicles approached each other from opposite directions** on New York State Highway 17, about fourteen miles east of Farley and two miles west of Owego in New York State. Plaintiff's intestate was the owner and operator of a 1950 Chevrolet sedan automobile tarveling in a generally easterly direction; the defendants were the owner and operator, respectively, of an 'International 200' tractor and trailer being driven in a general westerly direction. * * * New York State Highway 17 at the point of the accident is twenty to twenty-one feet wide and paved. On each side is a four to five foot shoulder. **Weather conditions were not good. It had been and was raining steadily that night** * * * ."
>
> **"The precise point of impact is in dispute, but it was on the westerly end of a 'six degree curve'** * * * ."
>
> * * * * *
>
> "At the site of the accident, the speed limit was fifty miles per hour. **There was no testimony that either vehicle at any time had exceeded this speed.** * * * The defendant Spenton testified he was going forty miles per hour before the accident, when he first saw the decedent's vehicle on the wrong side of the highway, and that he thereafter slowed to thirty-five miles per hour before the impact."
>
> * * * * *

"* * *. Thus, the only testimony of any physical evidence which might establish the point of impact (whether this testimony be accepted as worthy of credence or not) was that it was within a space fifty feet east of pole 515 * * *. But if the trier of fact found the mark on the highway never existed, this would add nothing to plaintiff's burden to establish liability. It might detract from the credibility of the testimony of the two deputy sheriffs, but adds nothing to plaintiff's case-in-chief."

* * * * *

"There is but one legal question before us on the principal case; **Was the evidence insufficient, as a matter of law, to justify the submission of the case to the jury?"**

"Appellee emphasizes the evidence which throws doubt (a) upon the existence of the 'fresh' scrape mark and 'debris' as testified to by Officers Davis and Lockwood; (b) the thoroughness and efficacy with which defendant Spenton 'checked' the brakes, tires and lights of his vehicle. But if both points are granted appellee, **they subtract from appellants' defense but add nothing to appellee's case. Weakness of proof that the accident occurred on the north or appellant's side of the highway does not prove it occurred on the south, or appellee's side. Nor does weakness of proof of due care, on the part of a defendant, even if it causes such affirmative evidence to be totally disregarded, prove a lack of due care or add one iota of proof of negligence on the part of that same defendant, if there exists no other proof of such lack. The burden of proof in personal injury actions still remains on plaintiffs.** *Code v. Swagler*, 1955, 308 N.Y. 325, 331, 125 N.E. 2d 592; *Standrassy v. Mooney*, 1933, 262 N.Y. 368, 371, 186 N.E. 867."

"* * *. Even were we to find some possible evidence of negligence in raising or lowering the

headlight beams at the last moment (which we do not), there is complete and absolute lack of proximate cause. *Cole v. Swagler, supra. Prosser, Law of Torts, Sections 47-50* (2ed. 1955)."

* * * * *

"Appellee urges that the evidence was sufficient to go to the jury, She relies on the rule that **'in a death case a plaintiff** is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence.' *Noseworthy v. City of New York*, 1948, 298 N.Y. 76, 80, 80 N.E. 2d 744, 746. In other words, but slight evidence of negligence is necessary. *Wank v. Ambrosino*, 1954, 307 N.Y. 321, 121 N.E. 2d 246. **With this rule we have no quarrel. But we have yet to find a precedent holding that where there is no evidence of a defendant's negligence that such case must go to a jury-absent a *res ipsa loquitur* factual situation, a case of absolute liability, or the adoption of the rule of liability without fault.** There being no facts in this case calling for the adoption of the first two principles, and New York not having as yet adopted what Dean Roscoe Pound has described as the doctrine of the involuntary Good Samaritan, we find no basis for claiming that any negligence of a defendant existed in this case. **The burden of such proof is on the appellee below.** There being no such proof, the judgment rests purely on conjecture and surmise, no cause of action has been estabilshed, and the judgment must be, and is reversed."

* * * * *

"Having determined that the evidence was insufficient as a matter of law to justify the submission of the case to the jury, appellant request us to reverse the judgment, set aside the verdict, reverse the denial of defendants' motion for final judg-

ment, and remand the cases to the District Court to act upon the two motions, allegedly heretofore unacted upon, to dismiss the complaint upon the ground the evidence was legally insufficient.

"Such motions to dismiss were made at the end of Plaintiff's case below, and after all evidence was in. These motions to dismiss were considered by both parties below, and by the trial court, as the equivalent of a motion for a directed verdict, properly made in jury cases. Cf. Rules 41 and 50, Federal Rules of Civil Procedure, 28 U.S.C.A.

"The record shows, however, that each of such motions were acted upon, after the verdict had been returned, at the same time appellants' motion to set aside that verdict was made and denied. (Appellants' Appendix, pp. 203, 204)

"All such motions, as to interpreted, were proper, and preserved appellants' rights. *Cone v. West Virginia Paper Company*, 1947, 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849.

"The judgment in favor of the plaintiff-appellee is reversed."

Admittedly, the above quotes are but excerpts from the opinion rendered by the Second Circuit in the quoted case; however, it is submitted that these excerpts clearly show the analogy of the facts in the quoted case to the facts in the case before this Court. Counsel for appellant contends that its insured driver, Calvin Williams, testified substantially as did the driver of the tractor and trailer in the quoted case—that is, that until approximately one or two seconds prior to the accident there was no reason for Williams to believe that the De Bram vehicle would come into his line of traffic and that the first clear indication that Williams had that the De Bram vehicle was in his line of traffic was his statement to the effect that approximately one second before the accident occurred, he (Williams) observed the De Bram ve-

hicle skidding sideways across the highway and into the path of his oncoming vehicle. The Court in the *Harshberger* case found that the facts as testified to and proved and giving benefit to the plaintiff of the rule that in a death case a plaintiff is not held to as high a degree of proof of the cause of action, the Court nevertheless found that there was insufficient evidence as a matter of law to submit the case to a jury.

VI.
CONCLUSION

For the following reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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HENRY B. ALSOBROOK, JR.,
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Commerce Building,
New Orleans 12, Louisiana,
Attorneys for Applicant.

Of Counsel:
ADAMS AND REESE.

CERTIFICATE

This is to certify that copies of this Petition have been served on counsel for respondents, Mr. Fred S. Bowes, 700 Second Street, Gretna, Louisiana, and Mr. Nicholas S. Masters, 509 Cigali Building, New Orleans, Louisiana, by placing same in the United States Mail, postage prepaid, on May _____, 1962.

_____
HENRY B. ALSOBROOK, JR.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,901

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Appellant,

versus

MRS. MARIA CONSUELO GARCIA DODART DeBRAM, ETC.,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 12, 1962)

Before TUTTLE, Chief Judge, POPE* and GEWIN, Circuit Judges.

PER CURIAM: This is a personal injury action, in which there were three plaintiffs, the operator and two guest passengers, arising out of an automobile collision which occufred on January 21, 1959, near midnight in the vicinity of Boutte, Louisiana, on U. S. Highway 90. The trial was before a jury. Verdicts were returned in favor of the two plaintiffs who were guest passengers and against the appellant, but in favor of the appellant in the

* From the Ninth Circuit, sitting by designation.

suit by DeBram, the other plaintiff, who was the operator of one of the automobiles. Appellant specifies the following errors: (a) failure to grant appellant's motion for a directed verdict at the conclusion of appellees' case; (b) failure to grant appellant's motion notwithstanding the verdict; and (c) a complete failure on the part of appellees to carry the burden of proof necessary to establish negligence on the part of the appellant's assured.

Essentially one question is presented for our decision; Was the evidence sufficient as a matter of law, to justify the submission of the case to the jury? We have concluded that there was sufficient evidence to warrant a submission of the case to the jury.

There were only two eye witnesses to the accident, DeBram, the operator of the automobile in which the appellees were riding as guest passengers, and Williams, the operator of the insured vehicle. There were other witnesses as to the location of the vehicles immediately after the accident, location of debris, photographs and a fairly detailed map of the section of the highway involved. The testimony of the witnesses is in hopeless conflict, but we are convinced that there was sufficient evidence to require the trial court to submit the issues involved to the jury and that the jury's verdict is supported by sufficient evidence. It is not our province to determine whether the jury could have drawn different inferences or conclusions from the evidence presented or to decide what the court might have concluded or inferred if the case had been tried without a jury. *Continental Casualty Company v. Holmes*, 5 Cir., 1959, 266 F. 2d 269, cert. den. 90 S. Ct. 140, 361 U.S. 877, 4 L. Ed. 114; *Gunning v. Cooley*, 281 U.S. 90, 50 S. Ct. 231; *DeZon v. American President Lines, Ltd.*, 9 Cir., 129 F. 2d 404; *Boston & Maine R. R. v.*

Cabana, 1 Cir., 148 F. 2d 150, cert. den. 325 U.S. 873, 65 S. Ct. 1414, 89 L. Ed. 1991; *Roth v. Swanson*, 8 Cir., 145 F. 2d 262, 265; Moore's Federal Practice, 2d Ed., Vol. 5, at 2314-2315; *Myers v. Reading Co.*, 331 U.S. 477, 485, 67 S. Ct. 1334, 91 L. Ed. 1615.

We have carefully considered *Deitz v. Greyhound Corporation*, 234 F. 2d 327 and *Harshberger v. Associated Transport, Inc.*, 282 F. 2d 179 (and other cases cited by appellant) which are strongly relied upon in the appellant's splendid brief. The two mentioned cases did not involve the rights of guest passengers.

In considering all of the evidence, including the testimony of witnesses and the physical facts as shown by the exhibits and the testimony, we must construe the evidence most favorably to the appellees and give full effect to every legitimate inference therefrom and every reasonable conclusion based thereon. *Carolina Life Insurance Co., et als. v. Williams, 5 Cir.*, 210 F. 2d 477; Cert. granted, 348 U.S. 802, 99 L. Ed. 633; *Phoenix Indemnity Co. of New York v. Girouard*, 5 Cir., 1958, 252 F. 2d 146; *Fruit Industries, Inc. v. Petty*, 5 Cir., 1959, 268 F. 2d 391; *Norman Tobacco & Candy Company, Inc. v. Gillette Safety Razor Co.*, 5 Cir., 1959, 264 F. 2d 751.

We conclude that the court did not commit error in refusing to grant the motion for a directed verdict or in refusing to grant the motion for judgment notwithstanding the verdict. The judgment is

AFFIRMED.

APPENDIX B

[172]

Filed 22 day of February 1962
Edward W. Wadsworth
Clerk of the United States
Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,901

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Appellant,

versus

MRS. MARIA CONSUELO GARCIA DODART DeBRAM, ETC.,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(February 22, 1962)

On Petition for Rehearing

Before TUTTLE, Chief Judge, POPE* and GEWIN, Circuit Judges.

PER CURIAM: It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby

DENIED.

* From the Ninth Circuit, sitting by designation.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1961

No. 982

MASSACHUSETTS BONDING & INSURANCE COMPANY,

Petitioner,

versus

MRS. MARIA CONSUELO GARCIA DODART DEBRAM, Individually and for and on Behalf of Her Minor Daughter, Maria Andrea Dodart,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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MASSACHUSETTS BONDING & INSURANCE COMPANY,

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MRS. MARIA CONSUELO GARCIA DODART DEBRAM, Individually and for and on Behalf of Her Minor Daughter, Maria Andrea Dodart,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

May It Please the Court:

INTRODUCTION.

Defendant-appellant, Massachusetts Bonding & Insurance Company, has petitioned this Court to grant certiorari to review the judgment of the Fifth Circuit Court of Appeals, which affirms the judgment of the District

Court for the Eastern District of Louisiana, entered after a jury verdict awarding damages to passengers in the car which was involved in an accident with a car, the operation of which was insured by petitioner.

The matters which petitioner seeks to have reviewed are the same as those urged in and rejected by the district Court and the Court of Appeals. There is no complaint that the proper state law was not applied by these courts. Essentially, petitioner's contentions resolve themselves to the one point, that the evidence was insufficient to sustain the verdict.

REASONS FOR DENYING CERTIORARI.

I.

Petitioner Has Failed to Show a Valid Basis for Granting Certiorari Under Rule 19, Supreme Court Rules, 28 U. S. C. A., as Applied by This Court.

This is simply a suit for damages which resulted in a favorable verdict for the plaintiffs. The sufficiency of plaintiffs' showing of negligence on the part of the driver of the car insured by defendant was questioned during the trial by motion for a directed verdict, which was denied. A motion for judgment notwithstanding the verdict and alternatively for a new trial based on the same contention was refused. The same plea was rejected by the Court of Appeals (Fifth Circuit) in a *per curiam* decision, which applies two well-established legal principles. These are: that it is not the province of the

appellate court to determine whether the jury could have drawn different inferences or conclusions from the evidence presented or to decide what a court without a jury might have found; and, that an appellate court must construe the evidence most favorable to the appellees and give full effect to every legitimate inference therefrom and every reasonable conclusion based thereon.

The policy of this Court in its consideration of applications for writs of certiorari, under Rule 19 of the present rules of the Supreme Court, and under former Rule 38, par. 5 (38 U. S. C. A. 67, 68), has been well expressed by Chief Justice Taft, speaking for a unanimous court, in *Layne & Bowler v. Western Well Works, Inc.*, 261 U. S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (quoted with approval in *Rice v. Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 619, 620, 349 U. S. 70, 90 L. Ed. 897):

> "• • • the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

Here there is no public question involved; no enunciation of legal principles which may have far-reaching effects in present and future litigation. This is a case of importance only to the parties involved, in that the plaintiffs by virtue of the results are compensated by petitioner for injuries received.

II.

There Was Ample Evidence Sufficient to Show Negligence on the Part of the Driver of the Vehicle Insured by Petitioner.

The record shows: that Williams, the driver of the insured car, was on an urgent mission for his employer (R. p. 131); that this car was more than 500 feet from the DeBram car (the one in which plaintiffs were passengers) when he could have seen this car with its front in the traffic lane next to the neutral ground of a four-lane highway (R. pp. 182-183); that he had warning of an unusual situation by the blinking lights of the DeBram car (R. pp. 224-229); that he continued on in this lane of traffic next to the neutral ground (R. pp. 176-179); that although there was ample opportunity, he failed to take available steps to avoid the accident (R. p. 135); and that he steadfastly refused to pin himself down to a fixed point as to when he saw or could have seen the DeBram car (R. pp. 147, 148, 150). There was testimony of disinterested witnesses, physical facts, maps and photographs supporting the DeBram version of the accident, which the jury chose to accept. The testimony of the witnesses for plaintiff and defendant was in conflict. Furthermore, Williams' lack of credibility was clearly demonstrated by his evasive testimony and by the fact that his version of how the accident happened as given in a written statement on the day after the accident did not coincide with his testimony at a deposition and on the trial.

The Court of Appeals, after a careful consideration of all of the evidence as contained in the record, concluded that there was sufficient evidence of Williams' negligence to warrant a submission of the case to the jury.

This Court in *Lavender v. Kurn, et al.*, 66 S. Ct. 740, 327 U. S. 645, 90 L. Ed. 916, dealing with the problem of "sufficiency of evidence," outlines the function of an appellate court where there is conflicting probative evidence which can support a finding either way. The Court said:

> "• • • But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. (citations) • • •.
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes

apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Under what clearly seems to be the firmly established policy of this Court, no reasonable basis has been pointed out by petitioner to warrant a review of the findings of the Court of Appeals. Prior decisions appear to support the rule that this Court will not review the findings of that court in matters involving weight or sufficiency of the evidence. In *National Labor Relations Board v. Pittsburgh S. S. Co.*, 340 U. S. 498, 71 S. Ct. 453, 456, 95 L. Ed. 479, it is expressed as follows:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Comm'n v. American Tobacco Co., 274 U. S. 543, 544, 47 S. Ct. 663, 71 L. Ed. 1193."

Petitioner has quoted at length from the case of *Harshberger v. Associated Transport, Inc.*, 282 F. (2d)

179 (2d Cir.). Factually and legally this case has nothing in common with the present case. Primarily, the rights of guest passengers were not involved as is the case here. Furthermore, it appears that in the *Harshberger* case plaintiff's intestate or driver was alone in his car when killed in the accident. Plaintiff was not able to produce any direct evidence to substantiate his assumptions or theory as to how the accident happened, or to contradict the overwhelming evidence presented by defendant, including the testimony of defendant's driver, who lived. That case is not controlling here.

CONCLUSION.

It is urged that petitioner has failed to present to this Court a factual or legal situation which calls for the exercise of its reviewing jurisdiction. It is suggested that certiorari should not be granted.

All of which is respectfully submitted.

Respectfully submitted,

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CERTIFICATE.

The undersigned attorney for respondents certifies that a copy of this reply brief has been served on counsel for petitioner, Messrs. W. Ford Reese and Henry B. Alsobrook, Jr., 847 National Bank of Commerce Building, New Orleans 12, Louisiana, by placing same in the United States mail, postage prepaid, on June ....., 1962.

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RAYMOND H. KIERR